WAR FOOD ADMINISTRATION
OFFICE OF MARKETING SERVICES
Washington 25, D. C.

SUMMARIES OF DECISIONS BY THE WAR FOOD ADMINISTRATOR
on complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

Number 281 April 20, 1945

S-3137, December 11, 1944, Docket 4351: (S.P.)

MANKATO FRUIT CO., MANKATO, MINN. v. E. E. FADLER CO., KANSAS CITY, MO., AND D. L. PIAZZA CO., MINNEAPOLIS, MINN.

Violation charged: Failure to pay for a car of apricots.

Principal points involved: Broker not responsible for loss unless sale was made different than stated in memorandum of sale; broker's memorandum of sale binding on buyer unless objected to promptly.
B-11
B-7

Order: Complainant awarded $1,267.84, plus interest against E. E. Fadler Co.; complaint dismissed as to D. L. Piazza Co.; publication of facts.

Reconsideration: Respondent Fadler's petition denied by order February 28, 1945, and original order made effective March 28, 1945.

Outline of facts

On or about July 21, 1943, through D. L. Piazza Company, as broker, complainant purchased from a Yakima, Washington, dealer a carload of apricots described by the broker's memorandum of sale as "1 car Washington Apricots - Usone at s/p Double row faced Approximately half each Moorpaks and Tiltons basis Moorpaks 2.30 net fob s/p Tiltons 2.15 net fob s/p lugs marked 14# net." On July 23, through the same broker, complainant made resale to E. E. Fadler Co. for $3,480.75, the broker's memorandum describing the commodity as "1 car Washington Yakima, District Apricots USONE at s/p about half each Moorpaks Tiltons Moorpaks 2.35 fob s/p Tiltons 2.20 fob s/p." On July 27, the Yakima firm loaded 1,530 boxes of apricots, consisting of an equal number of Tilton and Moorpak varieties, stamped U. S. No. 1, 15 lbs. net when packed. The boxes were packed tight, single faced, and full, meaning the boxes were turned tops down with the bottoms open, permitting the top layer of each box to be placed in rows by hand, the remaining spaces in the boxes being filled with loose apricots and the bottoms of the lugs nailed on last. The shipment was consigned to complainant at Mankato, Minnesota, where it arrived August 5. Fadler resold the fruit to a St. Louis, Missouri, firm. The car was diverted to Fadler at Kansas City, Mo.,

on August 7. The St. Louis buyer refused to accept the apricots on the ground they were too small in size, and Fadler made resale for net proceeds of $2,212.91. Complainant asked for an award of the purchase price plus $50 expended in attempting to collect the amount due. The broker's memorandum of sale issued in connection with complainant's purchase from the Yakima seller omitted any specification of size, and complainant contended that if the broker made sale to Fadler on any other basis than stated in the written memorandum of sale it was without authority and the broker should then be responsible for any loss sustained by complainant.

D. L. Piazza Company stated it acted only as broker and was in no way responsible to complainant for damages claimed.

Fadler claimed the apricots were to be double row faced, meaning two hand placed layers in the tops of the boxes instead of one, and that the description of pack is shown by the broker's letter to the Department dated October 8, 1943, reading in part "We should have shown on our confirmation that the apricots were packed, 'Double Row Faced'; however, through some inadvertence this was not shown . . ."; that the Moorpak variety was to be heavy five and six row and the Tilton heavy seven row; and that he did not accept the shipment, but, in an effort to dispose of the fruit to best advantage, caused it to be sold at Kansas City after the car had been diverted to that point by the prospective purchaser at St. Louis.

The parties waived an oral hearing.

Rulings included in decision

1. The broker's memorandum of sale from the Yakima dealer to complainant described the apricots as double row faced (which description was not set forth in the memorandum of sale from complainant to Fadler) and complainant failed to get exactly what was purchased, but, since complainant's cause of action against the broker concerned the resale to E. E. Fadler Company, the broker was not responsible to complainant unless the sale was actually made on a different basis than stated in the broker's memorandum. While the exhibits included in the report of investigation, served on all parties, relating to this phase of the case were not free from confusion, it was concluded from the evidence that complainant's cause of action against the broker was not convincingly established. The complaint against D. L. Piazza Company was dismissed.

2. The broker's memorandum of sale confirming the sale from complainant to Fadler carried the standard provision that "unless the seller or the buyer makes immediate objection upon receipt of his copy of this Standard Memorandum of Sale showing that contract was made contrary to authority given the broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated." There was no proof that

E. E. Fadler Company made objection to the terms of sale as specified by the broker.

3. The refusal of E. E. Fadler Company to pay the agreed price, in full, was in violation of section 2 of the Act. The claim of this respondent that the shipment was not accepted was contrary to the evidence. Complainant was awarded $3,480.75, less the undisputed amount of $2,212.91 remitted by Fadler to complainant in accordance with an order of the Administrator dated September 26, 1944, or $1,267.84, plus interest.

Reconsideration

Petition for reconsideration was filed by E. E. Fadler Co. who contended that since the broker's memorandum of sale was not signed by Fadler the transaction did not conform to the requirements of the statute of frauds and the contract was "not binding on respondent." It was held in order dated February 28, 1945, that the record showed that the broker issued its standard form of memorandum of sale. A broker, as such, has authority to issue a memorandum of sale for the purpose of making the sale which he negotiates enforceable. The memorandum issued, therefore, was binding on respondent in the absence of objection by respondent to its terms. The stay order of January 6, 1945, therefore was vacated and this order and the order of December 11 was made effective March 28, 1945.

S-3169, January 15, 1945, Docket 4347: (Hearing)

STEEL CITY FRUIT COMPANY, PITTSBURGH, PENNSYLVANIA v. MONHEIM'S WHOLESALE PRODUCE, UNIONTOWN, PENNSYLVANIA

Violation charged: Unjustified rejection of a carload of cantaloups.

Principal points involved: In f.o.b. sale the risk of deterioration in transit is on the buyer; rule is that when
F-13 buyer pays the freight, title passes at time of shipment and
N-1 risk of loss is on buyer; affidavits not admissible as evidence when hearing is held.

Order: Complainant awarded $2,087.50, plus interest; publication of facts.

Reconsideration: Petition filed by respondent was dismissed.

Outline of facts

In answer to a claim filed for the purchase price of a carload of cantaloups, respondent admitted the purchase but alleged it

was made subject to its right of inspection and acceptance on arrival at Uniontown, Pa., and that the cantaloups were unsalable and unfit for human consumption upon arrival and rejection therefore was not unlawful. The uncontroverted testimony of the witnesses at the hearing established the facts set forth below:

On June 21, 1943, respondent purchased from complainant a carload of "Delight" brand cantaloups shipped from Brawley, Calif., on June 19, 1943, to complainant at Pittsburgh, and while respondent's representative was in its office complainant by telephone requested the railroad to divert the car from Pittsburgh to respondent at Uniontown, Pa. Complainant on the same date executed and initialed a memorandum of sale or sales ticket showing the agreed price of $7 per crate for Jumbo 45's and $6.50 for Jumbo 36's and Standard 45's, plus $20 precooling, f.o.b. California, and a duplicate of the sales ticket was handed to respondent's representative while he was in complainant's office. The representative understood that the car was in transit and that, in accordance with this sales ticket, respondent was to pay the freight and precooling expense. On the same date complainant prepared and mailed to respondent an invoice for 66 crates of Jumbo 45's, 240 of Jumbo 36's and 7 of Standard 45's, at the specified prices, a total of 313 crates for $2,067.50 plus $20 precooling expense, or $2,087.50, and bearing notations "F.O.B. Shipping point" and "Due to the present emergency and irregularity of railroad schedules, we cannot be responsible for any delay that may accrue on above car." No objection or exception was taken thereto by respondent. On June 30 and July 1, respondent telephoned complainant in Pittsburgh several times, stating the car had not arrived and requesting that it be traced. On July 2, respondent's representative visited complainant's office and later in the day telephoned to inquire about the car, at 11:22 a.m. that date wiring complainant CAR LOPES NOT IN DIVISION FREIGHT OFFICE CANNOT LOCATE CAR AT ANY POINT SUGGEST YOU TRY TO LOCATE CAR AND DIVERT PITTSBURGH TO YOURSELF TOO LATE TO DO US ANY GOOD HERE NOW WILL GIVE YOU ALL SUPPORT I CAN. The car arrived at Uniontown on July 3 (14 days en route, although normal running time from Brawley to Uniontown is about 8 or 9 days) and was delivered by the railroad to respondent, who, the same day, inspected and rejected it on account of spoilage. After rejection the railroad shipped the car to Pittsburgh and dumped it on or about July 7 as a total loss due to the decayed condition of the melons.

Respondent, in her testimony, denied receiving the invoice and that it correctly recited the agreement.

Rulings included in decision

1. The risk of deterioration in transit was on the buyer and therefore he was not justified in rejecting the shipment. Both the sales ticket and the invoice carried the notation that the car was sold "fob shipping point" and respondent admitted the understanding was that the buyer was to be responsible for the

freight and precooling expense. On these facts alone, there is a familiar rule of the law of sales that it is to be presumed, when the buyer pays the freight, that title passes at the time of shipment and the risk of loss is on the buyer. Under the regulations promulgated for enforcement of the Act, in an f.o.b. sale the buyer assumes all risk of damage and delay in transit not caused by the shipper and has the right of inspection at destination for the purpose of determining that the produce complied with the terms of the contract or order at time of shipment, subject to the provision covering suitable shipping condition. "This right of inspection does not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit." Respondent made numerous phone calls to complainant in Pittsburgh on or about July 1, and his representative called in person at the complainant's office in Pittsburgh on July 2 to inquire as to the whereabouts of this car of cantaloups. This conduct on the part of respondent was a strong indication that respondent was well aware that the risk incident to delay in transit was to be borne by respondent, whose explanations that all this trouble was taken just to help complainant out was not at all convincing.

2. The evidence as to whether the cantaloups were in suitable shipping condition was not as clear as it might have been, since no Government inspection was obtained at the time of sale or at a convenient point in transit by the respondent, as was testified could have been made. Complainant offered in evidence an affidavit from the president of the company that shipped the cantaloups from Brawley and another affidavit from the Complainant's agent there, dealing with the condition of the car. Such affidavits are admissible under the shortened procedure, but they are not admissible when a hearing is held because the respondent has no opportunity to cross examine. Complainant offered to obtain depositions from these men, but that was not considered necessary because the testimony from the principal witnesses on both sides was to the effect that they would expect the car to be over-ripe after such a delay as occurred in this case. This evidence, in conjunction with the fact that the complainant had originally bought the car for himself, after it had apparently passed inspection by his agent in California, and with the fact that the respondent failed to obtain a Government inspection at the destination so as to provide unbiased evidence as to the exact extent of deterioration in the whole car, was sufficient to warrant the statement that a preponderance of the evidence supported the conclusion that what deterioration existed was the result of the delay in transit rather than the defective condition of the produce at the time of sale.

3. Respondent's rejection of the car was without reasonable cause and in violation of section 2 of the Act. Complainant was awarded $2,087.50, plus interest.

Reconsideration

Respondent filed a petition for reconsideration based on alleged errors as to the facts found and the law applied. In order dated April 23, 1945, dismissing the petition it was held that the evidence supported each of the findings and that all questions of law and of fact were considered in arriving at the conclusion that respondent's rejection was without reasonable cause in violation of the Act. The stay order was vacated and the order was made effective April 23, 1945.

S-3176, February 24, 1945, Docket 4429: (S. P.)

SIMON SIEGEL COMPANY, CHICAGO, ILLINOIS v. ANTON & MICKEL, TOLEDO, OHIO

Violation charged: Unjustified rejection of a carload of carrots.

Principal point involved: Respondent liable for loss in
G-7 view of agreement to stand loss on resale.

Order: Complainant awarded $637.63, plus interest; publication of facts.

Outline of facts

On January 19, 1944, George Mickel, one of the two partners of the respondent partnership, purchased from complainant a carload of 356 crates of Tex Glo brand carrots at $4.97 per crate delivered Toledo, rolling acceptance final, or a total net price of $1,482.82. Shipment was made from Texas but Anthony D. Anton, the other partner, claimed that the carrots could not be used and that Mickel had no authority to buy them, and respondent refused to accept the shipment. However, on January 25, 1944, respondent wired the War Food Administration: CONFIRMING CONVERSATION WITH MR. SIEGEL IN REGARDS TO CAR NUMBER FGEX 34837 HAVE SIEGEL DISPOSE OF CAR WILL STAND LOSS. Complainant made resale in New York City for net proceeds of $245.19, and notified respondent in February 1944 that the loss amounted to $1,237.63, the difference between $1,482.82 and $245.19. Respondent paid $600 on this account, but failed to pay the balance of $637.63.

Copy of the complaint and of the report of investigation was served on respondent on October 19, 1944, but no answer was filed. In accordance with the applicable rules of practice, an oral hearing was waived, and the allegations of the complaint were deemed to be admitted.

Ruling included in decision

By reason of the subsequent agreement whereby respondent authorized complainant to resell the shipment and agreed to protect complainant against loss on resale, respondent was liable for the loss sustained. In recognition of its liability, respondent paid $600 and its failure to pay the balance of $637.63 was in violation of section 2 of the Act. Complainant was therefore awarded $637.63, plus interest.

S-3178, March 5, 1945, Docket 4411: (S. P.)

J. F. MacNULTY, ALBANY, NEW YORK v. HANNAFORD BROTHERS COMPANY, PORTLAND, MAINE

Violation charged: Failure to pay brokerage fees on 15 cars of potatoes.

Principal point involved: Broker was agent of buyer and
B-1 entitled to brokerage, notwithstanding sales made at OPA
B-6 ceiling prices.

Order: Complainant awarded $270, plus interest; publication of facts.

Outline of facts

In an exchange of telegrams on June 11, 1943, respondent employed complainant as its broker to purchase, for shipment to Maine, 15 carloads of North Carolina potatoes at ceiling prices, for which service respondent was to pay complainant's brokerage charges. Complainant negotiated, on behalf of respondent, and respondent approved the purchase, from a dealer at Aurora, N. C., of 15 carloads, which were delivered to and accepted by respondent. Complainant asked for an award of $18 per car, or a total of $270 brokerage.

Respondent admitted the brokerage was due, but contended that $2.84 per cwt. paid the shipper was the maximum amount it could legally pay for these potatoes, and that payment of the brokerage would be in violation of O.P.A. regulations.

Rulings included in decision

1. Complainant was agent for the respondent, the purchaser of the 15 carloads of potatoes. The telegrams, copies of which were attached to the complaint, indicated that respondent first asked complainant to ship 15 cars to respondent, thereby making complainant respondent's agent to negotiate a purchase. The answer, in effect, admitted that the telegrams were as shown and that they correctly reflected the transaction.

2. Respondent's failure to pay the brokerage fees was in violation of section 2 of the Act. The O.P.A. has ruled that, on the facts as set out in the first paragraph hereof, the payment of brokerage by respondent to its agent will not constitute a violation of Rev. M.P.R. 271 of the O.P.A. Respondent's answer referred to Exhibit 10 annexed to the Administration's report of investigation as an opinion by the O.P.A. to the effect that it is not proper for respondent to pay the brokerage. The sentence, in which the Regional Price Attorney gave the opinion referred to, begins: "If the facts as stated in Preti's letter are true . . ." Preti was respondent's attorney and his letter stated, as his understanding of the fact, that complainant first specifically offered 15 cars of potatoes to respondent. Exhibit 9, annexed to the report of investigation, was a copy of a letter written by O.P.A. to the Administration prior to the letter which was Exhibit 10. The earlier letter clearly stated that Rev. M.P.R. 271 recognizes the position of a buying broker under contract with the buyer and receiving no compensation from the seller. The letter calls attention to the provision in the definition of broker (Rev. M.P.R. 271, section 8, subdivision 11) that if any person acts as an agent for the purchaser, his commission shall be paid by the purchaser and shall not be added to the purchaser's base price or maximum price. The contract in this case called for brokerage to be paid by respondent, not by the seller. Exhibit 12, annexed to the report of investigation, a letter to the Administration from the seller, explains as a country shipper's charge the 8¢-per-cwt. item in the bill rendered. Whether this charge was legal or illegal under the price-ceiling regulations, it was not made as a brokerage charge for the benefit of complainant. Complainant was awarded $270, plus interest.

S-3179, March 5, 1945, Docket 4371: (S. P.)

THOMAS CAITO SONS, INC., CLEVELAND, OHIO v. BASKET FRUITS, INC., YAKIMA, WASHINGTON AND WESCO FOODS COMPANY, CHICAGO, ILLINOIS

Violation charged: Failure to deliver six cars of prunes.

Principal points involved: Failure of broker to inform buyer of proviso excusing shipper from making delivery was
B-14 violation of Act; damages which are direct result of broker's
B-11 negligence are recoverable by broker's principal but must be proved.

Order: Complainant awarded $1 nominal damages against Wesco Foods Company; complaint against Basket Fruits, Inc., dismissed; publication of facts.

Outline of facts

On July 9, 1943, Wesco Foods Company contracted for the purchase from Basket Fruits, Inc., of ten cars of unfaced U. S. No. 1

fresh Italian prunes, at $2.45 per half-bushel basket f.o.b. Yakima, Washington, ($200 per car deposit to be paid at the seller's request), for later shipment, as evidenced by the seller's written confirmation which carried the proviso: "Delivery of entire ten cars is subject to seller's ability to get deliveries from growers." On July 10, Wesco Foods Company, acting as complainant's broker, in writing confirmed a sale of ten cars of unfaced, U. S. No. 1 fresh Italian prunes from Basket Fruits, Inc., to complainant at Cleveland, Ohio, at $2.45 per half-bushel basket, f.o.b., for a buying service charge of $25, and complainant made a deposit of $200 per car to Wesco. This confirmation did not contain the provision quoted above. During June and July, Basket Fruits, Inc., executed contracts with three growers in the Yakima territory, under which they were to market an estimated total of about 165 tons of prunes through Basket Fruits, Inc., from which source the latter expected to fill the ten-car order. From August 28 to September 3, Basket Fruits, Inc., shipped to Wesco four of the ten carloads, which were delivered to complainant, and on or about September 14, complainant was notified that, due to a shortage of production in the Yakima territory, it was doubtful that the full ten carloads could be delivered. Wesco repaid complainant $1,200, the unused portion of the $2,000 deposit. Complaint was originally filed against Wesco and Basket Fruits, Inc., on the allegation that purchase was made for resale and that, because of failure to receive the other six cars covered by its contract, complainant suffered a loss of profit of $5,768.10, for which an award was asked.

In answering the complaint, Basket Fruits, Inc., claimed to have had no knowledge of resale by Wesco to complainant and denied any liability to complainant. In a reply statement, complainant abandoned its cause of complaint against Basket Fruits, Inc.

Each party waived formal hearing and submitted evidence in accordance with the shortened procedure. Wesco's witness testified that complainant placed the order with the Cleveland branch office, which contacted the Chicago branch, which got in touch with the field office at Yakima; that the order was placed with Basket Fruits, Inc., by telephone and was confirmed by mail several days later; that confirmation was issued by the Chicago branch to complainant; that confirmation issued by Basket Fruits, Inc., carrying notation that acceptance of the order was subject to its ability to secure delivery from the growers, was later received by the Chicago office but, due to shortage in help, the matter was overlooked and complainant was not informed of such conditional delivery provision until August 31.

Rulings included in decision

1. Failure to inform complainant of the proviso intended to excuse deliveries by Basket Fruits, Inc., in the event it was unable to secure prunes from the growers, constituted the placing of the order upon a materially different basis than complainant had authorized. Wesco Foods Company's failure to transmit to complainant a

copy of the confirmation dated July 9, which it said was received from Basket Fruits, Inc., several days subsequent to the issuance of its confirmation to complainant dated July 10, constituted a violation of section 2 of the Act.

2. The measure of damages in actions arising out of brokerage transactions is generally the same as those arising out of any other transaction, i.e., compensation for the injury sustained. Damages which are the direct consequence of the broker's negligence are recoverable by the broker's principal, but, since it could not be determined to what extent and in what amount complainant was injured, complainant could be awarded only nominal damages of $1 against Wesco Foods Company. On the theory that Wesco was the actual seller of the prunes, complainant claimed damages stated as the difference between the cost to complainant and the wholesale market value of $4.25 to $4.50 per half-bushel basket at Cleveland during the period September 13 to 21, 1943. If the relationship of respondent and complainant was that of seller and buyer, complainant was not entitled to lost profits as reparation because complainant could have replaced the six cars, as it concedes in its letter of September 30, 1943. If complainant had known of the inclusion of the special provision in the contract to purchase from Basket Fruits, Inc., it might have cancelled its order given to respondent. However, it was not shown that if complainant had known of the seller's conditional delivery provision it could have entered into another contract to buy elsewhere at the same price or even at another price. Therefore, only nominal damages of $1.00 were awarded.